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CREDIT GUARANTEE CORPORATION MALAYSIA BHD v. SSN MEDICAL PRODUCTS SDN BHD

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
BADARIAH SAHAMID JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-111-01-2016]
30 DECEMBER 2016

C ***TORT:*** *Negligence – Duty of care – Whether arose – Furnishing of credit information into Bank Negara Central Credit Reference Information System ('CCRIS') – Whether defendant submitted wrong information regarding plaintiff's financial status to CCRIS report – Whether plaintiff's non-performing loan status caused by defendant's negligent reporting – Whether defendant owed duty of care to plaintiff – Whether there was breach of duty – Whether plaintiff a delinquent*
D *borrower – Whether claim in negligence unsustainable*

TORT: *Defamation – Libel – Whether defendant submitted wrong information regarding plaintiff's financial status to Bank Negara Central Credit Reference Information System ('CCRIS') – Plaintiff's statement of claim only made general reference to CCRIS report – Failure to pick out parts that were defamatory –*
E *Whether fatal to action – Defence of qualified privilege – Whether available to defendant – Whether defendant's furnishing of credit information into CCRIS reporting system for benefit of financial credit industry – Whether there was proof of actual malice – Order requiring defendant to publish apology in local newspaper – Whether disproportionate as CCRIS reports not accessible to general public –*
F *Whether order for apology ought not to be granted – Rules of Court 2012, O. 78 r. 3(3)*

The plaintiff, a small medium enterprise ('SME'), obtained a loan from Maybank under a Corporate Guarantee Corporation Direct Access Guarantee Scheme ('DAGS'). Under this scheme, the defendant, a financial
G institution, provided the guarantee cover needed to enable the plaintiff to obtain the loan from Maybank. On 28 October 2010, the outstanding loan of RM2 million to Maybank was subrogated to the defendant. The defendant liquidated the plaintiff's fixed deposit, which was a collateral to the loan, to reduce the loan amount to RM1,436,481.31, which was later restructured.
H A scheme of payment was agreed upon between the defendant and the plaintiff, whereby the plaintiff was to pay RM20,000 per month to the defendant. Meanwhile, the plaintiff attempted to obtain loans from other financial institutions but were rejected. The plaintiff made a search at the Bank Negara Central Credit Reference Information System ('BNM CCRIS')
I and discovered that the plaintiff had been wrongly reported as owing RM11,102,013 to the defendant. It was contended that the defendant was

informed of the misreporting but did not act promptly to rectify the erroneous fact. The plaintiff submitted that as a result of the adverse BNM CCRIS report, the plaintiff had suffered losses/damages in the form of loss of profits, lost business opportunity and its goodwill amongst its suppliers and business parties. The plaintiff thus filed the present suit against the defendant. At the High Court, these three causes of action were pursued by the plaintiff against the defendant (i) negligence in the conduct of the plaintiff's loan facility; (ii) negligent misstatement in submitting wrong information with regards to the plaintiff's account to the BNM CCRIS; and (iii) defamation where the defendant had wrongly reported the status of the plaintiff's loan facility to the BNM CCRIS which misreporting continued after the filing of the suit. The Judicial Commissioner ('JC'), in finding that the plaintiff had established its pleaded claim for the torts of negligence and defamation, found that (i) the defendant owed a duty of care to the plaintiff and had breached the said duty by allowing the plaintiff's loan to become a non-performing loan ('NPL'); (ii) the breach of duty of care by the defendant had materially contributed to the losses and hardship suffered by the plaintiff in regard to its credit standing and inability to obtain loans as a consequence of the misreporting; (iii) that the plaintiff had succeeded in proving the elements of defamation by libel as wrongful credit information was capable of bearing a defamatory meaning against the plaintiff. Hence, the defendant appealed. The defendant argued that (i) the JC was in error in asserting the existence of a duty of care based on the obligations of the parties created by contract; and (ii) that the libel action brought by the plaintiff was bad in law due to defective pleading and that the CCRIS report, read as a whole, was not defamatory to the plaintiff. Further, the defendant argued that it was protected by the defence of qualified privilege.

Held (allowing appeal; setting aside decision of High Court)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The plaintiff, defendant and Maybank were not in a tripartite contractual relationship under one framework, but rather they were *inter se* governed by separate and distinct agreements. There was no justification on the part of the JC in imposing a duty of care on the defendant with respect to its obligation as a guarantor of the loan given by Maybank and to its further alleged obligations. The plaintiff's non-performing loan ('NPL') status could not have been caused by the defendant's negligent reporting or submitting wrong information to CCRIS. As a result of the plaintiff's delinquency in its repayment to Maybank, it was Maybank that classified the plaintiff's facility as NPL. When the loan was subsequently subrogated to the defendant, the NPL status persisted since the plaintiff had remained delinquent from the time subrogation took place. (paras 31, 37 & 38)

(2) Any delay in the subrogation was inconsequential as the plaintiff was still unable to repay the loan, first to Maybank and then to the defendant after subrogation. It was only after an agreed repayment scheme entered into between the plaintiff and the defendant that the plaintiff resumed payment after a 30 months' default period. The delay in subrogation could not amount to a breach. In any event, the causal link between the alleged breach and the harm caused was lacking and remained unproved. Further, the quantum of the facility did not in any manner affect the plaintiff's NPL status. The wrong entry of RM11.16 million instead of RM1.5 million was irrelevant to the classification of NPL. (paras 39 & 40)

(3) It was the responsibility of the plaintiff and its directors to ensure prompt repayment of the loans taken since the loans were taken for the benefit of the plaintiff's business. Having been a delinquent borrower, the plaintiff was now finding excuses for its own default in repayments by capitalising on the defendant's reporting mistake in CCRIS. The claim in negligence was therefore unsustainable. (para 41)

(4) In libel and slander, the very words complained of, whether stated orally or published, are the facts on which the action is grounded. These are material facts which must be pleaded so that the defendant knows the precise charge against him and is then able to defend himself against it. It is insufficient to merely describe their substance, purpose or effect. It is essential to set out the actual words used so that the court can then decide, as a matter of law, whether the said words whether oral or published, give rise to the defamatory imputations alleged. Herein, the plaintiff's statement of claim made a general reference to the CCRIS report dated 3 December 2010. The plaintiff had clearly failed to reproduce any part of the CCRIS report much less picked out the parts that were defamatory. Failure to do so was fatal to the action. For this reason alone, the claim in defamation could not succeed. (paras 45-47)

(5) The defence of qualified privilege based on common interest should be available to the defendant by virtue of the fact that the elements of mutuality, reciprocity and protection of the wider public interest of the financial credit industry were clearly present. The defendant's furnishing of credit information into the CCRIS reporting system governed by BNM was to be utilised for the benefit of the nation's financial credit industry that comprises the commercial banks and other financial institutions that provide credit facilities to businesses and the general public. As a financial institution participating in the CCRIS reporting system, the defendant was subject to guidelines issued by BNM and had a duty to furnish credit information to BNM. Thus, the subject matter of this defamation suit was privileged and thus not

actionable, unless it was proved that the defendant was actuated by express or actual malice in publishing the words complained of. (paras 56 & 57)

(6) The JC had misinterpreted the law in ruling that the mere continuous publication of the false and untrue information would in law be regarded as malicious. In the absence of proof by the plaintiff of actual malice, the defence of qualified privilege should succeed. Further, the plaintiff had failed to file a reply which included a plea of malice as an answer to the defence of privilege as well as giving particulars of the facts from which malice was to be inferred (Rules of Court 2012, O. 78 r. 3(3)). The plaintiff could not succeed in establishing malice as an answer to the defence of qualified privilege. (paras 65 & 66)

(7) As for the JC's order requiring the defendant to publish an apology in the local newspaper, any such mandatory order must spell out in some detail what exactly was required of the defendant so as to make it possible for the defendant to comply. If any such order lacked details, it would invite legitimate criticisms of unenforceability. In the context of this case, an apology to the world at large, since it was to be made in a local newspaper, was disproportionate as the CCRIS reports were not accessible by the general public. The reports were only read by certain financial institutions. If at all an apology was to be issued, it should be published solely to readers of the CCRIS reports. However, such an apology was useless. An order for apology ought to have been considered only in the case where the offending party was willing in which the award of damages could then be reduced as an incentive for agreeing to either retraction of the offending material, which was not relevant to the present appeal. The order for an apology ought not to have been granted by the JC. (paras 67, 68 & 71)

Bahasa Malaysia *Headnotes*

Plaintif, sebuah perusahaan kecil dan sederhana ('SME') memperolehi pinjaman daripada Maybank di bawah Corporate Guarantee Corporation Direct Access Guarantee Scheme ('DAGS'). Di bawah skim ini, defendan, sebuah institusi kewangan, memberikan jaminan perlindungan yang diperlukan supaya plaintif memperolehi pinjaman daripada Maybank. Pada 28 Oktober 2010, pinjaman tertunggak RM2 juta telah disubrogasi oleh defendan. Defendan membubarkan deposit tetap, yang merupakan cagaran untuk pinjaman, bagi mengurangkan jumlah pinjaman ke RM1,436,481.31, yang kemudiannya disusun semula. Satu skim bayaran dipersetujui antara defendan dan plaintif, di mana plaintif harus membayar RM20,000 sebulan kepada defendan. Sementara itu plaintif cuba untuk memperoleh pinjaman daripada institusi kewangan yang lain tetapi ditolak. Plaintif membuat carian

di Bank Negara Central Credit Reference Information System ('BNM CCRIS') dan mendapati bahawa plaintif telah disalah laporkan sebagai berhutang sejumlah RM11,102,013 kepada defendan. Adalah dihujahkan bahawa defendan dimaklumkan berkenaan laporan salah itu tetapi tidak mengambil tindakan segera untuk membuat pembetulan. Plaintif menghujahkan bahawa akibat laporan salah BNM CCRIS, plaintif mengalami kerugian/kerosakan dalam bentuk kehilangan keuntungan, kehilangan peluang perniagaan dan nama baiknya dalam kalangan pembekal-pembekal dan pihak-pihak perniagaan. Plaintif oleh itu memfailkan guaman ini terhadap defendan. Di Mahkamah Tinggi, tiga kausa tindakan diambil oleh plaintif terhadap defendan (i) kecuaian dalam tindakan kemudahan pinjaman plaintif; (ii) salah nyata secara cuai dalam memberikan maklumat yang salah berkenaan akaun plaintif kepada BNM CCRIS; dan (iii) fitnah di mana defendan telah dengan salah melaporkan status kemudahan pinjaman plaintif kepada BNM CCRIS yang laporan salahnya itu berterusan selepas pemfailan guaman. Pesuruhjaya Kehakiman ('PK'), dalam memutuskan bahawa plaintif telah membuktikan tuntutan yang diplidkan dalam tort kecuaian dan fitnah, mendapati (i) defendan mempunyai satu kewajipan berjaga-jaga pada plaintif dan telah melanggar kewajipan tersebut dengan membenarkan pinjaman plaintif menjadi pinjaman tak terbayar ('NPL'); (ii) pelanggaran kewajipan berjaga-jaga telah menyumbang secara material pada kerugian dan kesusahan yang dialami plaintif berkenaan kedudukan kreditnya dan ketidakmampuannya untuk membayar pinjaman akibat laporan salah itu; dan (iii) plaintif berjaya membuktikan elemen-elemen fitnah melalui libel kerana maklumat salah kredit mampu membawa maksud fitnah terhadap plaintif. Oleh itu, defendan merayu. Defendan menghujahkan bahawa (i) PK salah dalam menyatakan terdapatnya kewajipan berjaga-jaga berdasarkan obligasi pihak-pihak yang dibentuk oleh kontrak; dan (ii) bahawa tindakan libel yang dibawa oleh plaintif adalah salah dari segi undang-undang kerana pliding yang cacat dan bahawa laporan CCRIS, dibaca secara keseluruhannya, tidak bersifat memfitnah kepada plaintif. Selanjutnya, defendan menghujahkan bahawa ia dilindungi oleh pembelaan keistimewaan bersyarat.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)

Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Plaintif, defendan dan Maybank tiada hubungan kontraktual tiga pihak di bawah satu rangka kerja, tetapi mereka ditadbir secara *inter se* oleh perjanjian-perjanjian berasingan dan berbeza. Tiada justifikasi oleh PK dalam mengenakan tanggungjawab berjaga-jaga ke atas defendan berhubungan obligasinya sebagai penjamin pinjaman yang diberikan Maybank serta dakwaan obligasi-obligasi lain. Status pinjaman tidak

terbayar plaintif bukan akibat kecuaian laporan atau salah maklumat kepada CCRIS oleh defendan. Akibat kesalahan plaintif dalam bayaran balik kepada Maybank, Maybank telah mengklasifikasikan kemudahan plaintif sebagai NPL. Apabila pinjaman seterusnya disubrogasi oleh defendan, status NPL berterusan kerana plaintif kekal salah dari masa subrogasi berlaku.

(2) Sebarang kelewatan dalam subrogasi tidak penting kerana plaintif tidak berkeupayaan untuk membayar pinjaman, pertama sekali kepada Maybank dan selepas itu kepada defendan selepas subrogasi. Plaintif mula membuat bayaran setelah lalai selama 30 bulan hanya selepas skim pembayaran balik dipersetujui antara plaintif dan defendan. Kelewatan subrogasi tidak berjumlah pelanggaran. Dalam apa jua keadaan, hubungan kausa antara pelanggaran yang didakwa dan kerugian yang dialami tidak memadai dan kekal tidak terbukti. Selanjutnya, kuantum kemudahan itu tidak menjejaskan status NPL plaintif. Entri yang salah RM11.16 juta dan bukan RM1.5 juta tidak relevan bagi klasifikasi NPL.

(3) Adalah tanggungjawab plaintif dan pengarah-pengarahnya untuk memastikan pembayaran balik segera pinjaman yang diambil kerana pinjaman telah diambil untuk faedah perniagaan plaintif. Plaintif sebagai peminjam bermasalah sekarang mencari alasan atas kegagalannya sendiri untuk membayar balik dengan mengambil kesempatan ke atas kesilapan laporan defendan pada CCRIS. Tuntutan kecuaian oleh itu tidak boleh dikekalkan.

(4) Dalam libel dan slander, kata-kata yang dipertikaikan, sama ada dinyatakan secara lisan atau diterbitkan, adalah fakta-fakta di mana tindakan itu diasaskan. Ini adalah fakta-fakta material yang harus diplidkan supaya defendan mengetahui pertuduhan yang dibawa terhadapnya dan boleh membela dirinya. Adalah tidak mencukupi untuk hanya menggambarkan bahan, tujuan atau kesan. Adalah penting untuk menyatakan kata-kata sebenar yang digunakan supaya mahkamah boleh memutuskan, sebagai perkara undang-undang, sama ada kata-kata tersebut secara lisan atau diterbitkan, membawa kepada fitnah memfitnah seperti yang didakwa. Di sini, pernyataan tuntutan membuat rujukan secara am kepada laporan CCRIS bertarikh 3 Disember 2010. Plaintif jelas gagal mengeluarkan semula mana-mana bahagian laporan CCRIS dan gagal memilih bahagian-bahagian yang membawa kepada fitnah. Kegagalan berbuat demikian memudaratkan tindakan. Berdasarkan alasan ini sahaja, tuntutan fitnah tidak boleh berjaya.

(5) Pembelaan keistimewaan bersyarat berdasarkan kepentingan bersama boleh diguna pakai oleh defendan berdasarkan fakta bahawa terdapat elemen-elemen kesalingan, sifat timbal balik dan perlindungan kepentingan awam luas berkenaan industri kredit kewangan. Pemberian maklumat kredit oleh defendan kepada sistem laporan CCRIS yang ditadbirkan oleh BNM digunakan untuk kepentingan industri kredit negara yang terdiri daripada bank perdagangan dan institusi kewangan lain yang menyediakan kemudahan kredit kepada perniagaan dan masyarakat umum. Sebagai institusi kewangan yang mengambil bahagian dalam sistem laporan CCRIS, defendan tertakluk pada garis panduan yang dikeluarkan oleh BNM. Oleh itu, hal perkara guaman fitnah ini adalah istimewa dan dengan itu tidak boleh diambil tindakan, melainkan jika ia membuktikan bahawa defendan digerakkan oleh niat jahat nyata atau yang sebenar dalam menterbitkan kata-kata yang dipertikaikan.

(6) PK telah salah tafsir undang-undang apabila memutuskan bahawa penerbitan berterusan maklumat yang palsu dan tidak benar akan dari segi undang-undang dianggap sebagai berniat jahat. Dalam ketiadaan bukti oleh plaintif bahawa terdapat niat jahat sebenar, pembelaan keistimewaan bersyarat harus berjaya. Tambahan, plaintif telah gagal memfailkan balasan yang termasuk pli niat jahat kepada pembelaan keistimewaan bersyarat dan juga memberikan butir-butir mengenai fakta-fakta di mana niat jahat adalah disimpulkan (Kaedah-Kaedah Mahkamah 2012, A. 78 k. 3(3)). Plaintif tidak berjaya membuktikan niat jahat sebagai jawapan kepada pembelaan keistimewaan bersyarat.

(7) Berkenaan perintah PK yang mengarahkan defendan menyiarkan permohonan maaf dalam akhbar tempatan, apa-apa perintah mandatori harus memberikan butir-butir mengenai apa yang diperlukan oleh defendan supaya defendan boleh mematuhinya. Jika perintah kekurangan butiran, ia akan menarik kritikan sah bagi ketakboleh laksana. Dalam konteks kes ini, permohonan maaf kepada seluruh dunia, sebab ia terpaksa dibuat dalam akhbar tempatan, adalah tidak seimbang kerana laporan CCRIS tidak boleh diakses oleh orang awam. Laporan hanya dibaca oleh institusi kewangan tertentu. Jika permohonan maaf perlu dikeluarkan, ia harus diterbitkan hanya kepada pembaca-pembaca laporan CCRIS. Walau bagaimanapun, permohonan maaf di sini adalah tidak berguna. Perintah permohonan maaf harus dipertimbangkan hanya dalam kes di mana pihak yang bersalah rela berbuat demikian, dan ganti rugi boleh dikurangkan sebagai insentif atas persetujuan untuk penarikan balik material yang salah, yang tidak relevan dalam rayuan ini. Perintah permohonan maaf tidak sepatutnya dibenarkan oleh PK.

Case(s) referred to:

Abu Samah Omar v. Zainal Montel [2003] 1 LNS 501 HC ***(refd)***
Adam v. Ward [1917] AC 309 ***(refd)***
Caparo Industries plc v. Dickman [1990] 2 AC 605 ***(refd)***
Chin Bay Ching v. Merchant Ventures Pte Ltd [2005] SGCA 29 ***(refd)***
Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2010] 5 CLJ 301 HC ***(refd)***
Dato' V Kanagalingam v. David Samuels & Ors [2006] 3 CLJ 909 HC ***(refd)***
DDSA Pharmaceuticals Ltd v. Times Newpapers Ltd [1972] 3 All ER 417 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan [2012] 8 CLJ 885 FC ***(refd)***
Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***
Harris v. Warre [1879] 4 CPD 125 ***(refd)***
Henderson v. Merrett Syndicates Ltd [1995] 2 AC 145 ***(refd)***
Horrocks v. Lowe [1975] AC 135 ***(refd)***
Infinity Exhibitions (M) Sdn Bhd & Anor v. Instant Exhibitions (Sabah) Sdn Bhd [2014] 1 LNS 1077 HC ***(refd)***
Lim Kit Siang v. Datuk Dr Lim Liong Sik & Ors [1996] 1 LNS 106 HC ***(refd)***
Pacific Associates Inc v. Baxter [1990] 1 QB 993 ***(refd)***
Redland Bricks Ltd v. Morris [1970] AC 652 ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Stuart v. Bell [1891] 2 QB 341 ***(refd)***
Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor [2011] 10 CLJ 739 HC ***(refd)***
Summertime Holdings Pty Ltd v. Environmental Defender's Office Ltd [1998] 45 NSWLR 291 ***(refd)***
Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors [1985] 2 All ER 947 ***(refd)***
TV3 Network Ltd v. Eveready New Zealand Ltd [1993] 3 NZLR 435 ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 78 r. 3(3)

For the appellant - Lim Chee Wee, Lua Kok Hiyong & Khong Siong Sie; M/s Lua & Mansor
For the respondent - AM Pillai & Chong Ian Shin; M/s Arulampalam & Co

[Editor's note: For the High Court judgment, please see SSN Medical Products Sdn Bhd v. Credit Guarantee Corporation Malaysia Bhd [2016] 5 CLJ 505 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This is an appeal against the decision of the High Court at Shah Alam delivered on 8 December 2015. The High Court had allowed the respondent's claims for the torts of negligence and defamation with a global

award of general damages to be assessed by the Registrar. Further, the appellant was ordered to publish a public apology in a local newspaper. Parties have, however, agreed to stay the execution of the judgment pending the outcome of this appeal.

[2] This appeal was heard on 15 July 2016. After hearing the parties and taking into consideration the written submissions, we had decided to allow the appeal and set aside the order of the High Court. Our reasons for doing so now follow. For convenience the parties will be referred to as they were in the High Court.

Salient Facts

[3] The salient facts giving rise to the civil suit and as summarised by the learned trial judge can be stated as follows. The plaintiff, a small medium enterprise ("SME"), obtained a loan from Maybank in 2004 under a Corporate Guarantee Corporation Direct Access Guarantee Scheme ("DAGS"). Under this scheme, the defendant provided the guarantee cover needed to enable the plaintiff to obtain the loan from Maybank.

[4] By way of a facility agreement dated 12 October 2004 between the plaintiff and Maybank ("first agreement"), the plaintiff was given a loan facility of RM350,000 in overdraft and RM340,000 in various combined trade lines. The corporate guarantee known as DAGS was provided by the defendant.

[5] Subsequently, a second facility agreement dated 29 December 2005 was entered between the plaintiff and Maybank ("second agreement") when the plaintiff received an increased loan facility from RM350,000 to RM1 million. This loan facility was secured by a fixed deposit collateral in the sum of RM610,000.

[6] On 28 October 2010, the outstanding loan of RM2 million to Maybank was subrogated to the defendant. The plaintiff had applied for the upliftment of its fixed deposit. This was rejected by the defendant. Instead the defendant liquidated the fixed deposit, which was a collateral to the loan, to reduce the loan amount to RM1,436,481.31.

[7] This loan amount of RM1,436,481.31 was later restructured and a scheme of payment was agreed upon between the defendant and the plaintiff sometime in September 2011. By this scheme, the plaintiff was to pay RM20,000 per month to the defendant.

[8] Meanwhile, the plaintiff attempted to obtain loans from other financial institutions. These applications were all rejected. The plaintiff made a search on 3 December 2010 at the Bank Negara Malaysia Central Credit Reference Information System ("BNM CCRIS") and discovered that the plaintiff had been wrongly reported as owing RM11,102,013 to the defendant.

[9] By a letter dated 10 January 2011, the defendant was informed of the misreporting. The defendant, it was contended, did not act promptly to rectify the erroneous fact.

[10] It was contended by the plaintiff that as a result of the adverse BNM CCRIS report, the plaintiff had suffered losses/damage in the form of loss of profits, lost business opportunity and its goodwill amongst its suppliers and business parties. The plaintiff then filed the present civil suit against the defendant on 29 August 2012.

At The High Court

[11] At the High Court, it appeared that three causes of action were pursued by the plaintiff against the defendant. These can be shortly stated as follows:

(a) Negligence in the conduct of the plaintiff's loan facility;

(b) Negligent misstatement in submitting wrong information with regards to the plaintiff's account to the BNM CCRIS; and

(c) Defamation where the defendant had wrongly reported the status of the plaintiff's loan facility to the BNM CCRIS which misreporting continued after the filing of the suit.

[12] After a trial involving ten witnesses, the learned Judicial Commissioner ("JC") came to the following conclusions. In respect of the action in negligence, the learned JC found that the defendant owed a duty of care to the plaintiff. The learned JC accepted that it was fair and reasonable to impose a duty of care on the part of the defendant in managing the plaintiff's DAGS loan with reasonable care and also in fulfilling its obligation as a guarantor of the loan under the guarantee given to Maybank.

[13] The learned JC also found that based on the relationship between the plaintiff and the defendant, it was plain and obvious that the defendant owed a duty of care to the plaintiff as it was foreseeable that any erroneous reporting of the plaintiff's credit status to a credit rating agency would result in injury or harm to the plaintiff.

[14] The learned JC then went on to decide that from the facts and circumstances adduced at the trial, the defendant had breached its duty of care by allowing the plaintiff's loan to become a non-performing loan ("NPL") on 15 June 2009 despite having been approached by the plaintiff to save the status of the loan.

[15] It was also further found that the defendant had failed to meet its obligations as a guarantor under the guarantee resulting in the loan becoming NPL. In particular, the defendant had failed to monitor the plaintiff's DAGS

loan with reasonable care and failed to fulfil its obligation under the guarantee by allowing the plaintiff's loan to remain as NPL for 19 months in arrears until 28 October 2010 when the loan was subrogated.

[16] The second aspect of the defendant's alleged negligence, as the learned JC found, was its breach of its duty of care in misreporting to BNM CCRIS that the plaintiff's loan with Maybank was in arrears of RM11.0 million which error the defendant took two months to rectify.

[17] On the element of causation, the learned JC found that the breach of duty of care had materially contributed to the losses and hardship suffered by the plaintiff in regard to its credit standing and inability to obtain loans as a consequence of the misreporting. It was further found that the loss and damage suffered by the plaintiff was reasonably foreseeable with the result that liability in negligence was established against the defendant.

[18] On the second cause of action in defamation, the learned JC found that the plaintiff had succeeded in proving the elements of defamation by libel. It was considered that wrongful credit information was capable of bearing a defamatory meaning against the plaintiff. The defence of qualified privilege, it was found, was not available as it was not supported by the facts and circumstances of the case. Further, the continuous publication of the false and untrue information was malicious as no attempt was made to rectify the error after it had been disclosed.

[19] On the last cause of action of negligent misstatement, the learned JC found that the essential material particulars of the defendant's liability for this tort had not been specifically pleaded. This claim was accordingly rejected by the court.

[20] In conclusion, the learned JC found that the plaintiff had established its pleaded claim for the torts of negligence and defamation. Judgment was accordingly entered with costs of RM100,000 to the plaintiff.

Our Decision

[21] Before us, the defendant argued that the learned JC fell into error when the claims for the torts of negligence and defamation were allowed. The judgment of the learned JC was assailed on a number of grounds. For convenience, we will deal with the issues raised in respect of each of the torts in the way in which the issues were resolved by the learned JC.

Negligence

[22] It was argued on behalf of the defendant that the learned JC was in error in asserting the existence of a duty of care based on the obligations of the parties created by contract. It was further argued that the jurisprudence did not recognise such duty of care.

[23] It was also contended that the NPL status was caused not by the defendant's negligent reporting but the inability of the plaintiff in meeting its payment obligations. The defendant also asserted that no *prima facie* case for negligence had been established as the elements of causation and damage were not borne out by cogent evidence at the trial.

[24] In this regard, it is important to consider at the outset the role of the defendant. The defendant was established by Bank Negara Malaysia to assist SMEs particularly those without collateral or with inadequate collateral and track record to obtain financing from financial institutions. Financial institutions are encouraged to advance facilities to such borrowers on the assurance that in the event the money advanced cannot be recovered from the borrowers, the defendant would indemnify the bank either through a guarantee or by way of subrogation of rights to offload those non-performing loans from the bank's books. For this purpose, the defendant receives a premium from the borrower.

[25] Given such a role, we agree that the learned JC had, with respect, failed to appreciate the role of the defendant as a collateral provider to support the plaintiff's loan application with Maybank. This role is not for the purpose of making repayments on behalf of the plaintiff and/or the plaintiff's directors (who act as guarantors for the loan) when they fall due.

[26] So contractually, it was for Maybank to exercise its right under the guarantee to demand or claim from the defendant as the collateral provider the amount outstanding under the loan due to the plaintiff's repayment default.

[27] Now of course the plaintiff is not claiming in contract but in tort. The learned JC made a finding that taking into account the relationship between the plaintiff and the defendant, and given the role of the defendant in assisting SMEs to obtain loans from banks, it was, as the learned JC put it "plain and obvious" that the defendant owed a duty of care to the plaintiff. In essence, as we had alluded to earlier, the learned JC took the view that the defendant had a duty of care towards the plaintiff in managing the loan and its obligations under the guarantee. How this duty arose was unfortunately not set out and we will come back on this later.

[28] Whether a duty of care exists or not in a given set of circumstances has been the subject of much discussion in a series of decisions in the Privy Council and the House of Lords. We only need to refer to a case of particular significance – the House of Lords decision in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 where Lord Bridge approved of the approach as follows (at p. 617):

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[29] It would now appear that the duty of care in tort depends upon the existence of the essential ingredients of the foreseeability of damage, relationship of proximity and the question of whether it is fair, just and reasonable for the law to impose such a duty. The genesis for the test of foreseeability and proximity lies in perhaps the most famous passage in case law relating to negligence. It was the celebrated case of *Donoghue v. Stevenson* [1932] AC 562 where Lord Atkin conceived the formula as follows (at 580):

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[30] In the instant case, the learned JC appears to have held the defendant liable under negligence purportedly on the basis of the defendant's failure to fulfil its contractual obligations towards the plaintiff as a guarantor for the loan. Apart from the fact that breach of contract was never pleaded as a cause of action, no evidence was adduced before the trial court in respect of any contract between the plaintiff and the defendant.

[31] At this juncture it is pertinent to observe that the plaintiff, defendant and Maybank were not in a tripartite contractual relationship under one framework, but rather they were inter se governed by separate and distinct agreements which can be summarised as follows:

(a) Firstly, the facility agreement ("facility agreement") executed between the plaintiff and Maybank for the credit facilities provided by Maybank to the plaintiff;

(b) Then, the Direct Access Guarantee Scheme Agreement ("DAGS agreement") executed between the defendant and plaintiff, wherein at the latter's request, the defendant agreed to act as the collateral provider in support of the plaintiff's loan application with Maybank; and

(c) Lastly, the letter of guarantee ("guarantee") given by the defendant to Maybank. It involved the defendant providing 100% guarantee as security for the plaintiff's loan pursuant to the DAGS agreement.

[32] With respect, we agree that the learned JC appeared to have conflated the contractual obligations of the defendant *vis-à-vis* Maybank with that *vis-à-vis* the plaintiff. As can be seen in his grounds of judgment, the learned JC made multiple references to the contractual obligations pursuant to the guarantee (which was actually given by the defendant to Maybank), and used the same as grounds for the conclusion that the defendant owed and had subsequently breached its duty of care towards the plaintiff.

[33] In this connection, we are reminded of the decision in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1985] 2 All ER 947 ("*Tai Hing*") where the Privy Council refused to impose on the customer a duty in tort to take reasonable care by perusing monthly bank statements in the bid to prevent forged cheques. The rationale was that tortious duty should not be introduced into the arena of contract where the parties could, if they wished, have stipulated such a duty by agreement but had not done so. Of particular significance is the much-quoted observation by Lord Scarman at p 957:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort …

[34] We take note of the House of Lords view in *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145 that the issue in the *Tai Hing* case was whether a tortious duty of care could be established which was more extensive than that provided for under the relevant contract. After considering the position in various jurisdictions, the House of Lords accepted that there can be in certain circumstances concurrent liability in tort and contract.

[35] However, the House of Lords also accepted that such a concurrent duty in tort will not be imposed in cases where the "tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded' (per Lord Goff at p. 194). Put slightly differently, the tortious duty of care must not be inconsistent with the relationship structure created by the contract which the parties had entered (see *Pacific Associates Inc v. Baxter* [1990] 1 QB 993).

[36] In essence therefore, and harkening to the fair, just and reasonable requirement as set out in *Caparo, supra*, in cases where the parties must be taken to have intended their rights and obligations to be governed exclusively by the contract or contracts which they have entered, especially in a commercial contract, that factor to be taken as a compelling one, or in some cases a decisive one, against the imposition of a duty of care in tort.

[37] Coming back to the instant appeal, we see no justification on the part of the learned JC in imposing a duty of care on the defendant with respect to its obligation as a guarantor of the loan given by Maybank and to its further alleged obligations. We find it curious as to how such a duty was "plain and obvious'' when the agreements between the defendant and the plaintiff (the DAGS agreement) and the letter of guarantee itself were never adduced as evidence at the trial.

[38] It also appears to have been overlooked that the plaintiff's NPL status could not have been caused by the defendant's negligent reporting or submitting wrong information to CCRIS. As a result of the plaintiff's delinquency in its repayment to Maybank, it was Maybank that classified the plaintiff's facility as NPL. When the loan was subsequently subrogated to the defendant, the NPL status persisted since the plaintiff had remained delinquent from the time subrogation took place in October 2010 until August 2011.

[39] It would be fair to surmise as well that any delay in the subrogation was inconsequential as the plaintiff was still unable to repay the loan, first to Maybank and then to the defendant after subrogation. Even if the defendant had paid Maybank in full upon demand, and there is no evidence of any such demand, the NPL status would not be affected in view of the plaintiff's ongoing inability to pay. It was only after an agreed repayment scheme entered into between the plaintiff and the defendant that the plaintiff resumed payment in September 2011 after a 30 months' default period. In our view, the delay in subrogation could not amount to a breach. In any event, as alluded to earlier, the causal link between the alleged breach and the harm caused is lacking and remains unproved.

[40] We were also persuaded by learned counsel for the defendant that the quantum of the facility does not in any manner affect the plaintiff's NPL status. The classification of NPL by financial institutions is done in accordance with Bank Negara Malaysia guidelines. There was evidence at the trial through DW3, an officer from RHB Bank Berhad, that a loan facility will be regarded as NPL after being in default for three consecutive months. This would mean that the wrong entry of RM11.16 million instead of RM1.5 million was irrelevant to the classification of NPL.

[41] Although it may be fair to say that an outstanding sum of RM11.16 million would be harder to repay, at the heart of this dispute is really the question of indebtedness. It was the responsibility of the plaintiff and its directors to ensure prompt repayment of the loans taken since the loans were taken for the benefit of the plaintiff's business. We certainly have no difficulty in accepting the defendant's characterisation of the situation as one where having been a delinquent borrower, the plaintiff is now finding excuses for its own default in repayments by capitalising on the defendant's reporting mistake in CCRIS. In the upshot, for the reasons stated, the claim in negligence is unsustainable.

Defamation

[42] In relation to the claim in defamation, it was argued on behalf of the defendant that the libel action brought by the plaintiff was bad in law due to defective pleading. It was also contended that the CCRIS report dated 3 December 2010 ("the CCRIS report"), read as a whole, is not defamatory of the plaintiff.

[43] It was also argued that the defendant is protected by the defence of qualified privilege; and that the plaintiff had failed to prove malice on the part of the defendant to defeat the defence of qualified privilege. It was further contended that the mandatory order of a public apology is disproportionate and unenforceable; and in granting the plaintiff's prayer for a public apology, the learned JC had incorrectly exercised his jurisdiction.

[44] On the first issue of defective pleading, it was asserted on behalf of the defendant that the exact words alleged to be defamatory were not pleaded and that this was fatal to the plaintiff's case.

[45] In this regard, it is settled law that in libel and slander, the very words complained of, whether stated orally or published, are the facts on which the action is grounded. In other words, these are material facts which must be pleaded so that the defendant knows the precise charge against him and is then able to defend himself against it. It is insufficient to merely describe their substance, purpose or effect. It is essential to set out the actual words used so that the court can then decide, as a matter of law, whether the said

words whether oral or published give rise to the defamatory imputations alleged (see *Harris v. Warre* [1879] 4 CPD 125; *Abu Samah bin Omar v. Zainal bin Montel* [2003] 1 LNS 501; [2004] 5 MLJ 377; *Lim Kit Siang v. Datuk Dr Lim Liong Sik & Ors* [1996] 1 LNS 106; [1997] 5 MLJ 523 and *Dato' V Kanagalingam v. David Samuels & Ors* [2006] 3 CLJ 909; [2006] 6 MLJ 521).

[46] The other aspect of pleading in an action in defamation is that where the plaintiff complains of an article, he must specify the offending sections rather than merely pleading the whole article. As Lord Denning MR pointed out in *DDSA Pharmaceuticals Ltd v. Times Newpapers Ltd* [1972] 3 All ER 417, a pleading is defective if it throws on to the defendant a long article without picking out the parts said to be defamatory.

[47] In the instant case, the plaintiff's statement of claim at para. 11 made a general reference to the CCRIS report dated 3 December 2010. The defamatory imputations were then set out in para. 19. The plaintiff had clearly failed to reproduce any part of the CCRIS report much less picked out the parts that are defamatory. Failure to do so, in our view, is fatal to the action. The learned JC appears to have not considered this important issue of defective pleading. For this reason alone, the claim in defamation cannot succeed.

[48] In view of our finding on defective pleading, we find it unnecessary to deal with the question of whether the CCRIS report, read as a whole, is or is not defamatory of the plaintiff. We would however deal with the defence of qualified privilege on the assumption that the CCRIS report was defamatory.

[49] On the defence of qualified privilege raised by the defendant, the learned JC found that the facts and circumstances of the case "clearly did not support and fulfil the elements for this kind of defence to succeed". The learned JC also came to the view that the defendant had "failed to discharge the onus of showing that the publication was fairly made by a person in the discharge of some public or private duty". The learned JC also came to a finding that "the continuous publication of the said false and untrue information would in law be regarded as malicious as no attempt was made to rectify the record despite being made aware of the grave error".

[50] Now at first glance this defence of qualified privilege seems quite odd, and certainly to the man on the street, as it provides protection for statements that are defamatory and in fact untrue. This protection emanates from grounds of public policy, common convenience and welfare of society. Unlike the other defences to a defamation action, qualified privilege attaches to the occasion or circumstances to the publication of the defamatory statements rather than the statement itself.

[51] The relationship of the parties is often a determining factor in establishing a privileged occasion. A common example is the character reference provided by one employer to another when considering the employment of the former/prospective employee. In *Stuart v. Bell* [1891] 2 QB 341 at 346, Lindley LJ explained the rationale for the defence as follows:

> The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be drawn as to mark off with precision those occasions which are privileged, and separate them from those that are not.

[52] So whether a particular occasion is a privileged one is therefore a legal question depending on the facts and circumstances of each case. The House of Lords in *Adam v. Ward* [1917] AC 309 perhaps best explained a privileged occasion in the following fashion (at 334):

> … an occasion where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[53] This formulation envisaged a duty to publish and receive information by people of ordinary intelligence and moral principles as well as the reciprocity of interest (*Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 3 AMR 514; [2010] 5 CLJ 301; [2010] 2 MLJ 492). This privilege is qualified in the sense that a defendant is protected from liability unless the plaintiff can prove actual malice.

[54] In the instant appeal, the plaintiff sought to rely on the case of *Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan* [2012] 8 CLJ 885 ("*FIS*") where the Federal Court did not accept the defence of qualified privilege, holding that the particular company, Financial Information System Sdn Bhd ("FIS"), which disseminated commercial and financial information of a third party to its members on payment of fees ought not be protected, it being no more than a credit agency trading for profit.

[55] After careful consideration, we however agree with the contention of the defendant that the factual matrix in the *FIS* case is different and can be distinguished from that which exists in the present appeal. In the instant case, it was revealed at the trial through the evidence of a Bank Negara Malaysia officer (PW6) that each bank or financial institution which wishes to subscribe for access to the pool of information available within CCRIS must itself agree to provide regular performance data about its own customers into the pool maintained and administered by BNM. PW6 confirmed that the use of CCRIS by participating financial institutions, voluntary or otherwise, is subject to guidelines issued by BNM.

[56] In contrast to the *FIS* case, we find that the defence of qualified privilege based on common interest should be available to the defendant by virtue of the fact that the elements of mutuality, reciprocity and protection of the wider public interest of the financial credit industry are clearly present. There was no element of profit or narrow self-interest unlike the *FIS* case. The defendant's furnishing of credit information into the CCRIS reporting system governed by BNM was to be utilised for the benefit of the nation's financial credit industry that comprises the commercial banks and other financial institutions that provide credit facilities to businesses and the general public.

[57] As a financial institution participating in the CCRIS reporting system, the defendant is subject to guidelines issued by BNM and has a duty to furnish credit information to BNM. With that being the case, the subject matter of this defamation suit is privileged and thus not actionable, unless it was proved that the defendant was actuated by express or actual malice in publishing the words complained of. In the upshot, the learned JC was, with respect, in error in finding that the defence of qualified privilege was not available to the defendant.

[58] Now of course, as was alluded to earlier, qualified privilege is defeated if malice is established. The burden is on the plaintiff to prove that the defendant was actuated by actual malice. In essence, what must be shown is a dominant and improper motive to injure the person defamed. An improper motive simply means a motive other than for the purpose for which the privilege is given. This can be established by showing that a person defaming knew that his words were untrue or at least did not believe them to be true (see *Horrocks v. Lowe* [1975] AC 135; *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173).

[59] The Federal Court in the *FIS* case, *supra*, had accepted the meaning of malice to include situations where a defendant had on purpose abstained from making the necessary inquiries to ascertain the truth or had been reckless with the truth. We must however hasten to add, and it seems a fair proposition, that whilst reckless indifference to the truth may amount to malice, mere negligence is not enough.

[60] It is important to note that the Federal Court in the *FIS* case agreed with the Court of Appeal that FIS was wantonly reckless in not updating its database and failed in its duty to use its best endeavours and efforts to ensure the accuracy of the information supplied to finance companies, thus a reasonable inference of malice on the part of FIS could be safely made.

[61] In that case, the respondent's two bankruptcies in 1981 and 1991 were annulled and rescinded in September 1995 and October 1997 respectively. The report provided by FIS to Affin ACF-Finance Berhad a few years later (in March 2000) did not reflect the two annulments. The misreporting of Hj Salleh Hj Janan, who was at the material time no longer a bankrupt, as an undischarged bankrupt was reckless and constituted a grave error that contributed significantly to the rejection of his loan applications by Affin ACF-Finance Berhad and Arab-Malaysian Finance Berhad.

[62] On the other hand, in the instant appeal, misreporting the amount of indebtedness was an inadvertent oversight by the defendant that was rectified within 1 1/2 months after being notified by the plaintiff. Further, as mentioned earlier, the plaintiff failed to elicit any evidence during trial to prove that it was the defendant's misreporting of the amount of indebtedness that had led to the rejection of the plaintiff's loan applications.

[63] In the circumstances, we agree that the learned JC had misinterpreted the law in ruling that the mere continuous publication of the false and untrue information would in law be regarded as malicious. In the absence of proof by the plaintiff of actual malice, the defence of qualified privilege should succeed.

[64] Be that as it may, still on the question of malice, there is another serious infirmity which appears to have been overlooked by the learned JC. Under O. 78 r. 3(3) of the Rules of Court 2012 ("ROC 2012"), the plaintiff must serve a reply giving particulars of the facts and matters from which malice is to be inferred. For convenience O. 78 r. 3 of the ROC 2012 is set out below:

> **Obligations to give particulars (O. 78, r. 3)**
>
> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

[65] It is not disputed that the plaintiff had failed to file a reply which included a plea of malice as an answer to the defence of privilege as well as giving particulars of the facts from which malice is to be inferred. The reason for this requirement is obvious. It is to provide an opportunity to the defendant to verify the truth and accuracy of those particulars as well as to rebut the allegations if required (see *Subramaniam a/l Paramasivam v. Courts Mammoth Bhd & Anor* [2011] 10 CLJ 739; [2010] 9 MLJ 363).

[66] Being a mandatory requirement under the ROC 2012 in respect of a specific matter, the recent Federal Court decision in *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719 ("*Gurbachan Singh*"), in our respectful view, cannot assist the plaintiff to overcome such defect in the pleading. Unlike the *Gurbachan Singh* case, any objection to such evidence being adduced in the instant case would have been pointless as such evidence would have been relevant to the cause of action in negligence and in any case relevant and closely connected to the defence of qualified privilege. In the circumstances, even at the outset, the plaintiff cannot succeed in establishing malice as an answer to the defence of qualified privilege.

[67] For completeness, we come now to the order of the learned JC requiring the defendant to publish an apology in the local newspaper. It is trite that any such mandatory order must spell out in some detail what exactly is required of the defendant so as to make it possible for the defendant to comply. If any such order lacks details, it will invite legitimate criticisms of unenforceability (see *Redland Bricks Ltd v. Morris* [1970] AC 652). We however agree that in the case of a dispute, the parties should be able to go back to the trial judge to clarify and obtain specific directions as to any apology ordered. So nothing really turns on this issue in the instant appeal.

[68] What however concerns us is whether the discretion to order the apology was rightly exercised by the learned JC. In this context, we agree that an apology to the world at large, since it was to be made in a local newspaper, is disproportionate as the CCRIS reports are not accessible by the general public. The reports are only read by certain financial institutions. If at all an apology is to be issued, it should be published solely to readers of the CCRIS reports (see *Infinity Exhibitions (M) Sdn Bhd & Anor v. Instant Exhibitions (Sabah) Sdn Bhd* [2014] 1 LNS 1077).

[69] We would also add that although courts have the jurisdiction to grant mandatory injunctions in a defamation action, including an order for an apology, nevertheless, because of the nature of the remedy, the exercise of such discretion calls for the utmost restraint. In other words, only in an exceptional case would an order for apology be favourably considered by the court (see *TV3 Network Ltd v. Eveready New Zealand Ltd* [1993] 3 NZLR 435; *Summertime Holdings Pty Ltd v. Environmental Defender's Office Ltd* [1998] 45 NSWLR 291).

[70] In this regard, we think it is important to distinguish between an order forcing a defendant to apologise from an order compelling a withdrawal or correction of an offending statement. On this question, we find ourselves in agreement with the views expressed by the Singapore Court of Appeal in *Chin Bay Ching v. Merchant Ventures Pte Ltd* [2005] SGCA 29 where it was held (at para. 25):

> We recognise the force of the argument that a defendant should not be compelled to apologise against his will as the very spirit of an apology is that it must come from the heart, something which the defendant wishes to do on account of the wrong he has done to the plaintiff. On the other hand, an order compelling a defendant to merely withdraw, or correct, an offending statement after a trial, seems to be of a different character or genre from that of an apology. In the same way that the court compels a defendant to pay damages for the defamation, there is no reason or principle why it cannot compel the issue of a correction. Of course, the cases where the court should think that justice requires the grant of a mandatory injunction, to issue either a letter of withdrawal or correction, must be quite exceptional.

[71] In the instant appeal, we note that the apology was ordered by the court despite the defendant's unwillingness to do so. Such an apology is really useless. An order for apology ought to have been considered only in the case where the offending party was willing. In such a case, the award of damages can then be reduced as an incentive for agreeing to either retraction of the offending material, which is not relevant to the present appeal, or an apology for publishing the said material. For the reasons we have stated, we take the view that the order for an apology ought not to have been granted by the learned JC.

Conclusion

[72] In the circumstances, and for the reasons we have given, we are of the view that the decision of the High Court was plainly wrong. We have set out our reservations concerning the decision and the orders made which warrant appellate intervention. Accordingly, we allowed the appeal and set aside the order of the High Court with costs here and below fixed at RM120,000 subject to payment of allocator fees. We also ordered the refund of the deposit to the appellant/defendant.